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**“LIONS AND TIGERS AND BEARS, OH MY” OR “REDSKINS
AND BRAVES AND INDIANS, OH WHY”: RUMINATIONS ON
MCBRIDE V. UTAH STATE TAX COMMISSION, POLITICAL
CORRECTNESS, AND THE REASONABLE PERSON**

andré douglas pond cummings^{*}

I. INTRODUCTION

It is to be hoped that one day all offensive and derogatory language, speech, and symbols predicated on race will be completely eradicated from our culture. In the meantime, public officials have the obligation to ensure that they are not used with the imprimatur of the State¹

On January 29, 1999, the Utah Supreme Court handed down an important and historic opinion wherein it held that the term “Redskin” may be too

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1. *McBride v. Motor Vehicle Division of Utah State Tax Comm’n*, 977 P.2d 467, 473 (Utah) (1999) (Durham, A.C.J., dissenting).

offensive a word to appear on vanity license plates in its state.² In a bold, unprecedented move, the five Justices of the Utah Supreme Court reversed a previous administrative decision which had found that the term was "not offensive" and was simply a mascot used for a professional sports franchise.³ This despite widespread national use of the term "Redskins," due in large part to the Washington D.C. National Football League ("NFL") team.⁴

This article provides an in-depth analysis of *McBride v. Motor Vehicle Division of the Utah State Tax Comm'n* and particularly examines the Utah Supreme Court's use or misuse of the objective, reasonable person standard in the context of race, ethnicity and racial hatred. Part II of this article sets forth the facts of and reactions to *McBride*. Part III then analyzes and critiques the *McBride* decision. Part IV reviews and rejects the logic of the majority opinion's use of the reasonable person standard in determining the offensiveness of the term "Redskin." Part V concludes by examining national trends and the implications of *McBride* for this continuing debate and struggle.

II. *MCBRIDE* GENERALLY

A. *McBride v. Motor Vehicle Division of the Utah State Tax Comm'n*

In *McBride v. Utah State Tax Comm'n*, three Utah resident Washington Redskins fans ordered and displayed personalized license plates that read respectively, "REDSKIN," "REDSKNS," and "RDSKIN."⁵ Two Native American petitioners challenged these license plates before the Motor Vehicle Division of the Utah State Tax Commission.⁶ The petitioners claimed that these plates were a violation of a state statute and an administrative rule forbidding vanity license plates that were "offensive to good taste and decency" and bearing terms that were "vulgar, derogatory, profane, or obscene."⁷

2. See *id.* at 467; Judy Fahys & Ray Rivera, *Supreme Court Rejects 'Redskin' License Plates*, S.L. TRIB., Jan. 30, 1999, at B1.

3. *McBride*, 977 P.2d at 467.

4. The Detroit Lions, Chicago Bears, and Detroit Tigers (Lions, and Tigers and Bears) all prominent professional sports franchises, took their names and mascots from fierce animals representing strength, power and determination. Unfortunately, many years ago, teams in Washington, D.C., Atlanta, and Cleveland (Redskins and Braves and Indians) also sought to associate their sports franchises with mascots and names befitting strength, power and ferocity. Today, these teams have all come under fire for their lack of vision. See generally *infra* notes 91-95.

5. *McBride*, 977 P.2d at 468.

6. See *id.*

7. UTAH CODE ANN. § 41-1a-411(2) (1993); UTAH ADMIN. CODE R873-22M-34 (1995). Section 41-1a-411(2) provides that the Motor Vehicle Division "may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading." *Id.* Rule 873-22M-34 of the Utah Administrative Code provides in pertinent part:

The vigorous debate before the Supreme Court at oral argument focused on whether the term “Redskin” was a derogatory, vulgar and obscene racial epithet, or whether it had become a benign nickname of a professional sports franchise, and therefore was not offensive.⁸ The Native American petitioners claimed that the term “Redskin” was descriptive of an early practice in the colonial United States whereby the British Crown offered a “bounty for the scalps of Native American men, women, and children.” In order to collect the bounty, the colonials were required to “skin the body of the Native American and bring in the ‘red skin’” as proof of the kill.⁹

The vanity plate owners countered that “they harbored no ill-will” toward their Native American neighbors. Rather they wanted to express their unabashed joy in, and support for, their favorite NFL football team.¹⁰

Siding with the Native American petitioners, the Utah Supreme Court reversed the Tax Commission’s holding that the term “Redskin” was not offensive and ordered it to apply a “reasonable person” standard in determining whether “any connotation” of that term could be considered offensive.¹¹ On March 4, 1999, the Tax Commission returned a unanimous decision that found the name “Redskin” did indeed contain at least one connotation that was offensive, and was therefore in violation of the commission’s own administrative rule.¹² The personalized vanity plates at issue were revoked.

B. Reactions

Utah reactions to the Supreme Court decision and the Tax Commission ruling were surprising in their intensity.¹³ One of the vanity plate owners

B. Pursuant to Section 41-1a-411, the division may not issue personalized license plates in the following formats:

1. Combination of letters, words, or numbers with any connotation that is vulgar, derogatory, profane or obscene. . . .
4. Combinations of letters, words, or numbers that express contempt, ridicule, or superiority of a race, religion, deity, ethnic heritage, gender, or political affiliation.

Id.

8. See *McBride*, 977 P.2d at 468 (reviewing the arguments and exhibits presented at the formal hearing before the Tax Commission, which arguments were primarily the same as those argued before the Supreme Court).

9. *Id.* at 473 (Durham, A.C.J., dissenting).

10. *Id.* at 468.

11. See *id.* at 470.

12. See Ray Rivera, *Panel Revokes ‘Redskins’ Plates Deemed as Slur*, S.L. TRIB., Mar. 4, 1999, at A1 (“The four-person commission, which included three new panel members, voted unanimously to reverse its 1996 decision allowing the personalized plates, which said ‘REDSKIN,’ ‘REDSKNS,’ and ‘RDSKIN.’ The change of heart came a month after the Utah Supreme Court ruled the Commission should have considered what an ‘objective, reasonable’ person would find offensive.”).

13. Upon hearing the Supreme Court ruling, Kathy Jackson, one of the vanity plate own-

claimed that the Native American plaintiffs likely never "saw her plates," and that the lawsuit was less about doing the right thing and more about a "trumped-up effort" to gain publicity.¹⁴ Michael McBride, one of the Native American petitioners, speaking in his native Lakota language, praised his attorney, Brian Barnard, and reiterated that this lawsuit would benefit Native American children everywhere.¹⁵ "I'm not doing this just for myself," McBride declared.¹⁶ McBride recalled being referred to as "redskin" in his childhood and remembered that "[t]he way it's used, it ridicules a race of people. It hurts. . . . My skin is not red; no other Indian's skin is red. . . . It is a derogatory and denigrating term."¹⁷ "The feeling I get from it . . . is anger."¹⁸

The Assistant Attorney General who had argued the case before the Supreme Court for the Tax Commission, tried to downplay the Supreme Court ruling by calling it a "split decision without finality."¹⁹ This hollow assertion is belied by a cursory reading of *McBride* in which all five Justices of the Supreme Court agreed that the term "Redskin" could have obscene and derogatory connotations and remanded the case to the Tax Commission to so find.²⁰ Meanwhile, attorney Barnard lamented the length of the invalidation process by declaring "[t]hey should have revoked the plates a long time ago."²¹ Barnard continued "[i]t's an appropriate decision and a decision that

ers declared "It's a sports team—that's all it is. . . . If I felt those two Native Americans were offended, I could take a little heart in this But this is a trumped-up thing to get [attorney] Brian Barnard's name in the paper." Fahys & Rivera, *supra* note 2, at B1. Michael McBride, one of the Native American petitioners, claimed that Jackson was "hurting a whole race of people" with her "REDSKIN" vanity plate. *Id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. Joe Costanzo, *End of the Road for Utah Plate? Justices Send the Issue Back to Tax Commission*, DESERET NEWS, Jan. 30, 1999. McBride further stated that it does not matter if the term "Redskin" is being hurled at an Indian child by a white playmate, blazoned across the jerseys of a National Football League team, or stamped onto a Utah license plate, the term is racist and debilitating nonetheless. *See id.*

18. *Id.* In a similar reaction to being referred to as a "Redskin," Keith Harper, a member of the Native American Rights Fund stated "[i]f you dehumanize us, then you can enslave us, then you can commit genocide against us." Daniel A. Grech, *Activists Team Up Against 'Redskins'; Protesters At Rally Call For Name Change*, WASH. POST, June 20, 1999, at C5.

19. Fahys & Rivera, *supra* note 2. The intensity with which the Tax Commission and the State Attorney General defended the "REDSKIN" license plates was startling. Particularly startling when considering that the same tax board that validated the "REDSKIN" plate was the same tax board that invalidated vanity plates bearing the monikers "TAX2MAX," "TAXLAND," and "MINWAGE" as violative of the statute and administrative rule at issue. *See* Rolley & Wells, *License Plates 2MAKETAX Folks See Red*, S. L. TRIB., June 3, 1998, at B1; *McBride*, 977 P.2d at 473. The tax board's surprising actions are difficult to analyze: amidst swirling controversy, the tax board decided that the term "Redskin" was not offensive nor derogatory, but then quietly determined later that "TAX2MAX" and "TAXLAND" was too offensive and derogatory to appear on Utah personalized license plates. *See id.*

20. *See generally McBride*, 977 P.2d at 467.

21. Fahys & Rivera, *supra* note 2.

hopefully will educate people as to the offensive meaning and offensive history of that term.”²²

C. Nationwide Dispute

To be sure, the vanity plate dispute does not reflect merely a Utah issue; it mirrors a nationwide controversy that has been increasing in magnitude in the United States for many years. The use of Native American symbols and nicknames by professional sports franchises has engendered bitter debate between Native Americans (and other opponents) and sports enthusiasts (and other detractors).²³ Much has been written in legal periodicals, particularly over the past decade, debating the appropriate place for legal action as it relates to Native American images and symbols in popular culture.²⁴

III. *MCBRIDE* ANALYSIS

The Utah Supreme Court split three to two in announcing its decision to invalidate a Utah Tax Court ruling which had found that the term “Redskin” was not offensive to good taste or decency, was not derogatory, and was not obscene.²⁵ Although the vote was split, the division of the court was actually based on how best to react to the obviously offensive term.²⁶ All five Justices agreed that the term “Redskin” could contain offensive and derogatory connotations that would require revocation of the vanity license plates bearing the term.²⁷

22. Rivera, *supra* note 12, at A1.

23. See generally Ethan G. Zlotchew, “Scandalous” or “Disparaging”? It Should Make a Difference in Opposition and Cancellations Actions: Views on the Lanham Act’s Section 2(A) Prohibitions Using the Example of Native American Symbolism in Athletics, 22 COLUM.-VLA J.L. & ARTS 217 (1998); Michelle B. Lee, Section 2(A) of the Lanham Act as a Restriction on Sports Team Names: Has Political Correctness Gone Too Far?, 4 SPORTS LAW. J. 65 (1997); Jendi B. Reiter, Redskins and Scarlet Letters: Why “Immoral” and “Scandalous” Trademarks Should be Federally Registerable, 6 FED. CIRCUIT B. J. 191 (1996); George Likourezos, A Case of First Impression: American Indians Seek Cancellation of the Trademarked Term “Redskins,” 78 J. PAT. & TRADEMARK OFF. SOC’Y 275 (1996); Paul E. Loving, Native American Names in Athletics: It’s Time to Trade These Marks, 13 LOY. L.A. ENT. L.J. 1 (1992); Kimberly A. Pace, The Washington Redskins Case and the Doctrine of Disparagement: How Politically Correct Must a Trademark Be?, 22 PEPP. L. REV. 7 (1994).

24. See *supra* note 23.

25. See generally *McBride*, 977 P.2d at 467.

26. See *id.* (Zimmerman, J., concurring and Durham, A.C.J., dissenting (joined by Stewart, J.)).

27. See *id.*; Joe Costanzo, Justices Reject ‘REDSKIN’ Ruling: Court Assails Tax Panel for Allowing Plate, DESERET NEWS, Jan. 29, 1999 (“A controversial Tax Commission decision that allowed the use of the term ‘REDSKIN’ on a Utah license plate was reversed and assailed by the Utah Supreme Court justices on Friday. . . . In a splintered but essentially unanimous opinion . . . the Supreme Court . . . ordered the Tax Commission to reconsider its earlier ruling

The difference in opinion between Justice Leonard Russon, the author of the majority opinion, and Associate Chief Justice Christine Durham, the author of the dissenting opinion, revolved around what standard of review should have been applied and what procedural result should have ultimately been reached.²⁸ Essentially, Justices Durham, Daniel Stewart and Michael Zimmerman agreed that the term "Redskin" was offensive and carried at least one connotation that would automatically disqualify the term from appearing on a state sanctioned license plate.²⁹ On the other hand, Justice Russon and Chief Justice Richard Howe withheld any determination on whether the term "Redskin" was offensive, vulgar and derogatory, holding instead that the Tax Commission had applied an inappropriate standard of review. The matter was sent back to the Commission to apply the appropriate standard in determining whether any term appearing on vanity license plates was offensive.³⁰ These differences in rationale were at the root of the division in this opinion, and globally are at the root of the nationwide dispute.

and to use as its standard of review 'that of the objective, reasonable person.'").

28. See *McBride*, 977 P.2d at 468, 472.

29. See *id.* at 471-73. Associate Chief Justice Durham and Justice Stewart, through joining her dissent, plainly state:

The end of the majority opinion's extensive analysis is a refusal to invalidate the issuance of personalized license plates containing an acknowledged racial epithet. This Court should hold that the Tax Commission violated its own administrative rule, and we should also invalidate the issuance of the plates outright instead of remanding the matter to the Tax Commission.

Id. at 472. Justice Zimmerman echoes this in his special concurrence when he essentially warns the Tax Commission to do the right thing by following its own administrative rule through invalidating the plates:

I note that the Tax Commission's own rule requires it to deny a personalized plate that has a term that a reasonable person would conclude has "any connotation that is . . . derogatory." Without prejudging the matter, it appears that it would be extremely difficult for a "reasonable person" to find that the term "redskin" does not have at least one offensive connotation.

Id. at 471. With the three judge block of Justices Durham, Stewart, and Zimmerman, a majority of the Utah Supreme Court agreed that the term "Redskin" was an offensive, derogatory, and inappropriate use of a racial slur (or at least in the case of Justice Zimmerman, had at least one connotation that could be perceived as such). Justices Durham and Stewart acknowledged this racial slur openly and Justice Zimmerman apparently was compelled by the language of the administrative rule to so agree. See *id.*

30. See *id.* Justice Russon writes:

The Commission in its written order determined that the term "redskin" was not offensive either to individual commissioners or to the general public and that the term therefore did not violate either section 41-1a-411 or rule 873-22M-34. In light of the foregoing, we hold that the Commission did not apply the correct test in determining whether a license plate contains a prohibited connotation or expression. We therefore reverse the Commission's order and remand for further proceedings consistent with this opinion.

Id.

A. McBride Majority

The statute at issue in *McBride* was section 41-1a-411 of the Utah Code. The Utah legislature granted the Motor Vehicle Division of the Utah State Tax Commission the discretion to determine whether or not to validate an applicant's request for a personalized license plate, as follows: "The division may refuse to issue any combination of letters, numbers, or both that may carry connotations offensive to good taste and decency or that would be misleading."³¹ Exercising its rule making authority,³² the Tax Commission enacted an administrative rule for self-guidance in determining whether to deny personalized license plate requests:

B. Pursuant to Section 41-1a-411(2), the division may not issue personalized license plates in the following formats:

1. Combinations of letters, words or numbers with any connotation that is vulgar, derogatory, profane, or obscene. . . .
4. Combination of letters, words, or numbers that express contempt, ridicule, or superiority of a race, religion, deity, ethnic heritage, gender, or political affiliation.³³

In December 1995, Native American petitioners Michael McBride and Jay Brummet petitioned the Motor Vehicle Division of the Tax Commission to revoke the three Utah vanity plates containing the term "REDSKIN" as violative of the aforementioned state statutes.³⁴ The Motor Vehicle Division denied the petition and the petitioners appealed to the Tax Commission.³⁵ On August 28, 1996, the Tax Commission held a formal hearing wherein petitioners related their personal experiences with the term "Redskin," and where dozens of affidavits and exhibits were entered denoting the historical roots of the term.³⁶ Also at the formal hearing, the vanity plate owners testified that they were fans of the "Washington Redskins," an NFL team in Washington, D.C., and "that the only reason they requested the plates was to show their support and admiration for that team."³⁷

31. UTAH CODE ANN. § 41-1a-411(2) (1993).

32. See UTAH CODE ANN. § 41-1a-104(3) (1993) (granting the Tax Commission the authority to "make and enforce rules necessary to effectuate" the Motor Vehicle Act).

33. UTAH ADMIN. CODE R873-22M-34 (1995). Interestingly, while the administrative rule forbids ("may not") the issuance of license plates that carry "any connotation" that is "vulgar, derogatory, profane, or obscene" and forbids the issuance of license plates that "express contempt, ridicule, or superiority" based on "race, religion . . . ethnic heritage," the majority opinion focuses on the term "Redskin" carrying a connotation that is "derogatory" and gives short shrift to the seemingly more obvious violation of the term "Redskin" expressing contempt based on "race" and "ethnic heritage." See *McBride*, 977 P.2d at 468-71.

34. See *McBride*, 977 P.2d at 467.

35. See *id.*

36. See *id.*

37. *Id.*

On September 9, 1996, the Tax Commission denied McBride's and Brummet's petition in a written order.³⁸ The Tax Commission determined that:

the same issues were raised by petitioner's attorney in *Brian M. Barnard v. Motor Vehicle Division* . . . and that the final order in that appeal, dated December 22, 1994, was fully dispositive of petitioners' appeal. The Commission attached a copy of its 1994 order and incorporated it into the 1996 order, which is the subject of this appeal.³⁹

In denying the request, the Tax Commission relied wholly on the fact that, because the Washington Redskins were recognized nationwide, if not worldwide, as a sports team, the term was "not offensive" and did not "express 'contempt, ridicule, or superiority.'"⁴⁰ Two commissioners went so far as to write that "in their opinion, the license plates expressed positive support" and that such positive support fell well within the limits of the statute and the administrative rule.⁴¹

On appeal before the Supreme Court, McBride and Brummet argued that the Tax Commission's decision should be overturned on the grounds that (1) it violated section 41-1a-411 of the Utah Code, (2) it violated administrative rule 873-22M-34, and (3) its decision was not supported by substantial evidence.⁴²

The majority opinion focused its analysis on what was deemed to be the erroneous standard of review the Tax Commission used in its disposition of the issues.⁴³ Because two Commissioners relied on their own personal view

38. *See id.* at 468.

39. *Id.* (citations omitted). The Utah Court of Appeals reviewed Barnard's appeal, after the Utah Supreme Court transferred the matter, and denied review essentially finding that Barnard lacked standing to challenge the offensive nature of the term "Redskin" because he was not Native American himself. *See Barnard v. Motor Vehicle Div.*, 905 P.2d 317, 320-23 (Utah Ct. App. 1995). Essentially Barnard himself earlier challenged the "Redskin" license plates as violative of state statute. *See id.* Because he was denied review based on standing, Barnard brought the case a second time at the behest of Native American petitioners. This second challenge was the dispute at issue before the Supreme Court. Another point of great interest can be raised here based on the denial of the Utah Court of Appeals to review Barnard's first challenge because he himself is not recognizably Native American. The Court of Appeals appears to be paternalistically determining that a non-Native American petitioner cannot be offended or degraded by a racial slur directed at a race other than his own. *See generally id.* at 320-23. The statute and rule at issue here merely state that terms may not appear on vanity license plates if they are offensive, derogatory profane or if they express contempt based on race, religion or ethnicity. *See supra* notes 31-33 and accompanying text. The Utah Court of Appeals essentially held that Barnard, due to the fact that he was not Native American, *could not* be offended or degraded by the term "Redskin." *See generally Barnard*, 905 P.2d at 320-23. This determination is a weak and short-sighted attempt apparently meant to deflect answering a difficult question. Certainly racial epithets and slurs can deeply offend individuals who are not the ultimate target of the intended offense.

40. *McBride*, 977 P.2d at 468 (quoting written order of Tax Commission).

41. *Id.*

42. *See id.*

43. *See id.* at 469 ("As is evident from the Commission's order, the Commissioners could

of the term “Redskin,” an additional Commissioner analyzed the term as the “general public” would, and because one final Commissioner determined his analysis based on what “some people” felt, the majority believed that its main objective and priority was to establish an appropriate standard under which to analyze offensiveness in the future.⁴⁴

To begin its analysis, the *McBride* majority immediately repudiated the Tax Commissioners’ use of their own personal opinions in determining the level of offensiveness of the challenged term.⁴⁵ “Relying upon the opinion of any one person or group in determining whether a term carries a prohibited connotation is not a reasonable application of either section 41-1a-411 or rule 873-22M-34.”⁴⁶ By determining that it was inappropriate for the Commissioners to use their own opinion, the majority rejected the idea that a lone opinion can be determinative.⁴⁷

Next, the majority opinion dismissed the notion that “the general public’s perception” was an appropriate test for determining the offensiveness of a particular term.⁴⁸ Because “the general public may be wholly ignorant of a term’s connotation,” the majority determined that it was unreasonable to rely on the perceptions and feelings of the general public.⁴⁹

not agree on the appropriate test to apply in determining whether the license plates should be revoked. Commissioners Oveson and Shearer believed that their own opinions of offensiveness were controlling. Commissioner Tew, however, believed that the appropriate test was whether the ‘general public’ would consider the plates offensive. In his dissent, Commissioner Pacheco argued that the test should be whether only ‘some people’ were offended.”).

44. *Id.*

45. *See id.*

46. *Id.* The majority continues by claiming that the opinion of any one person would always be unreasonable whether the opinion is that of a government official, a Native American citizen, a non-Native American, or any individual in general. *See id.* The majority further opines:

[T]he personal opinions of individual commissioners should not be relevant in applying the rule, for a term that is offensive or derogatory to one commissioner may be innocuous to another. Permitting the Commission to base its decisions upon the personal opinions of its commissioners would be tantamount to allowing an agency to follow or ignore its own rules to suit its own purposes—an approach which lies at the very heart of arbitrary and capricious action and which would frustrate the Commission’s proper role to apply its rules consistently and objectively, regardless of the personal views of individual commissioners.

Id. at 470.

47. *See id.*

48. *Id.*

49. *Id.* The majority uses an example to make its point:

[O]ffensive slang in an obscure foreign language may be meaningless to the general English-speaking public; nevertheless, the reasonable person who speaks the foreign language would conclude that the slang carries an offensive connotation.

Id. See, e.g., Kahn v. Department of Motor Vehicles, 16 Cal. App. 4th 159, 20 Cal. Rptr. 2d 6, 13 (Ct. App. 1993) (revoking license plate containing court reporter symbols repre-

The majority further stated that relying "upon the opinion of any one group, whether it be small or large" would be an unreasonable approach by the Tax Commission in determining a term's offensiveness.⁵⁰ The majority firmly declared that if reliance upon "any one group" were permitted, then the "issuance of *any* personalized license plate" would be precluded because "members of any group could assert that *any given term* is offensive to them."⁵¹ The majority concluded its "sky is falling" analysis as it pertains to the perceptions or opinions of "any one group" by stating that "virtually any term could be barred so long as 'some people' found it offensive."⁵²

Finally, the majority declared that the only reasonable and applicable standard when a court or agency was called upon to determine the offensiveness of a challenged term was the objective reasonable person standard.⁵³ "In other words, under rule 873-22M-34 the Commission had to determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term 'redskin' contains any vulgar, derogatory, profane, or obscene connotation, or expresses contempt, ridicule or superiority of race or ethnic heritage."⁵⁴ Thus, without ruling on whether the term "Red-skin" was offensive, derogatory, or in violation of the statute, the majority held that if an objective, reasonable person might conclude that a term carried at least one connotation that was offensive, derogatory or profane, then the Tax Commission was prohibited, by its own rule, from issuing a license plate carrying that term.⁵⁵ The majority held that: "[i]n light of the foregoing, we hold that the Commission did not apply the correct test in determining whether a license plate contains a prohibited connotation or expression. We therefore reverse the Commission's order and remand for further proceedings consistent with this opinion."⁵⁶

senting "the four letter epithet often referred to as the 'F-word'").

50. *Id.*, but see *infra* notes 101-02 and accompanying text.

51. *Id.* (emphasis added).

52. *Id.* To buttress its statement that relying upon the opinion of any group whether it be large or small as absolutely unreasonable, the majority used an example:

To illustrate, the Commission gave an example in its order of a complainant who challenged the issuance of a license plate bearing the combination "023 GNG." According to the complainant, the plate extolled the virtues of the 23rd Street Gang in Ogden, Utah. Ironically, the plate was not a personalized plate, but a normal plate bearing the letters and numbers generated by computer.

Id. Apparently, this example was more than enough evidence to convince the majority that if reliance upon perceptions or opinions of general groups of citizens whether large or small was allowed, then no personalized plates would ever be approved in Utah because virtually "any term" could be challenged as offensive. *Id.*

53. See *id.*

54. *Id.*

55. See *id.*

56. *Id.*

B. McBride Dissent

In a stinging rebuke to the majority, the dissenting opinion focused primarily upon the extensive evidence, facts, and exhibits placed into the record by the Native American petitioners, most of which, the majority ignored.⁵⁷ The dissent took issue with the majority's refusal to invalidate the offending plates outright suggesting that those in the majority ducked the most important question.⁵⁸

In coming to this conclusion, Justice Durham noted several key points that the majority failed to address. First, the dissent criticized the majority for "gratuitously, and with no analytical support" deciding that relying upon the "opinion of any one person or group" could be a reasonable application of the statutes and rules in question.⁵⁹ While agreeing that to take into account the "personal opinions" of the Tax Commission would be an unreasonable application, the dissent belittles the majority for determining "that the 'opinion' of the petitioners should not count either."⁶⁰ Particularly puzzling to Justice Durham, was the majority's refusal to recognize that the Native American petitioners expressed far more than mere "opinion" in challenging the racial epithet: "I do not understand exactly what evidence the majority would require to demonstrate that a derogatory and obscene racial slur is more than just the 'opinion' of its targets and is in fact offensive. Certainly, in my mind, petitioners proved far more than just their personal opinions."⁶¹

57. *See generally McBride*, 977 P.2d at 470-73 (Durham, A.C.J., dissenting).

58. *See id.* at 470. In the dissent, Justice Durham, joined by Justice Stewart, writes:

The end of the majority opinion's extensive analysis is a refusal to invalidate the issuance of personalized license plates containing an acknowledged racial epithet. This court should hold that the Tax Commission violated its own administrative rule, and we should also invalidate the issuance of the plates outright instead of remanding the matter to the Tax Commission.

Id. at 472. The dissent seems to scold the majority for failing to make a definitive statement and for failing to stand up in determining whether the term "Redskin" is indeed offensive and derogatory. *See generally id.* at 470-73. Rather, the majority pawns this task off on the Tax Commission, but in reality, giving that Commission little choice in the decision it must make. *See McBride*, 977 P.2d at 471. (Zimmerman, J., concurring) ("Without prejudging the matter, it appears that it would be extremely difficult for a 'reasonable person' to find that the term 'redskin' does not have at least one offensive connotation.").

59. *Id.* at 472 (Durham, A.C.J., dissenting) (quoting the majority opinion).

60. *Id.* In "gratuitously" declaring that those parties or individuals offended or degraded by the offensive or vulgar nature of a term are merely expressing an "opinion," and in deciding that the "opinion" of that individual or those groups should never count or be considered when determining whether a term is derogatory or expresses contempt based on race or ethnic heritage, the majority itself degrades those in minority populations and insular groups who often rely on government and state protection from racial animosity. *See generally id.*; *see also infra* notes 99-101.

61. *See id.* at 472. (Durham, A.C.J., dissenting).

Secondly, the dissent was critical of the majority for ignoring the testimony and affidavits of educators and clinical psychiatrists when it refused to declare the term "Redskin" offensive and derogatory.⁶² The dissent pointed out that the majority ignored facts that showed conclusively that the term "Redskin" is "the name and symbol of the genocidal practice of paying white soldiers a bounty for the bloody skins of murdered Native Americans."⁶³

[I]n 1755, the British Crown offered a bounty for the scalps of Native American men, women, and children living in the New England colonies. As stated plainly in the affidavit of a clinical psychologist: To demonstrate that there had been a kill, soldiers were required to skin the body of the Native American and bring in the "red skin." "Redskin" is in particular a horrifying reminder of what amounted to genocide of many of the Native American people.⁶⁴

The dissent clearly explained that the Washington N.F.L. football team and the staunch supporters of the team and logo, either purposely or unwittingly, celebrate a term representing particularized genocide and murder.⁶⁵ This reality exists even though the majority ignored this historical discussion of the term "Redskin."⁶⁶

Next, the dissent criticized the majority for failing to consider current trends and greater public awareness when it refused to invalidate the challenged term outright.⁶⁷ Justice Durham pointed out that in recent years many colleges and professional sports teams have changed antiquated nicknames, mascots and logos due to their offensive nature.⁶⁸

Saint John's University has in recent years changed the name of its mascot from "Redmen" to "Red Storm." Sioux City Iowa has recently ceased using the name "Soos" for its minor league baseball team. The Washington Redskins have been under fire for years to change the name of its football team.⁶⁹

Justice Durham noted that despite inexplicable resistance from team owners, the Washington D.C. City Council "passed a resolution asking the

62. See *McBride*, 977 P.2d at 472.

63. *Id.*

64. *Id.* (citations omitted).

65. See *id.*

66. See *id.*

67. See *id.*

68. See *McBride*, 977 P.2d at 472.

69. *Id.* Further evidence of this trend "away from the cartoonish and derogatory use of the image of Native Americans as mascots," include Stanford University, switching its mascot from "Indians" to the "Cardinal" and also high profile mascot changes at Marquette and Dartmouth universities. *Id.* at 472. See Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 905 n.16 (1999) [hereinafter *Public Accommodations*]. In fact "[o]ver 100 colleges and universities have replaced Indian team names and Indian mascots." *Id.* n.16.

Washington Redskins to change its team name to 'a name that is not offensive to Native Americans or any other minority group.'"⁷⁰

Lastly, the dissent rejected the reasoning of the majority because the majority ignored compelling evidence that the term "Redskin" was an offensive racial epithet.⁷¹ The majority refused to acknowledge evidence presented by petitioners showing the definition of "Redskin" in the dictionary exactly mirrored the definition of the "n-word."⁷² As Justice Durham wrote "[t]he term 'Redskin' has been defined by Webster's Ninth New Collegiate Dictionary as 'American Indian—usually taken to be offensive' Similarly, the term [n-word] is defined by this same dictionary as 'Negro—usually taken to be offensive.'"⁷³ The dissent proclaimed that "no court in this country would approve legislative enactment allowing the use of such a destruc-

70. *McBride*, 977 P.2d at 472. Noting that because the "Washington Redskins" are privately owned, the dissent points out that said private owners can take any name they wish and ignore editorials, resolutions passed by city councils, and public opinion generally. *See id.* Interestingly, the Washington N.F.L. team has recently been purchased by new ownership giving Native Americans and other activists hope that new ownership would seriously consider changing the team name. *See* Leonard Shapiro & Mark Maske, *NFL Approves Snyder as Redskins Owner*, WASH. POST, May 26, 1999, at A1; Grech, *supra* note 18. Unfortunately, despite much criticism, Daniel Snyder, the new owner has indicated that he has no intention to change the team name or mascot. *See* Gene Weingarten, *Memo: A Home Team Name Game*, WASH. POST, Jan. 12, 1999, at C1; *see also* Terrance Lynch, *Don't Publish A Name Rooted In Racism*, WASH. POST, June 27, 1999 at B8 ("Certainly, The Post and other publications do not print other pejorative words used to describe ethnic or cultural groups—so why is it different with this name? Ethnic slurs and name-calling are efforts by one culture to subjugate or have power over another. Publishing these words helps legitimize a destructive pattern of behavior."). This refusal comes on the heels of another Washington D.C. professional team owner, Abe Pollin, actually changing the name and mascot of his team, the Washington Bullets to the Washington Wizards, because he claimed that the original name (Bullets) connoted violence in a violent city. *See* Weingarten, *Memo: A Home Team Name Game*, *id.* at C1. The change from Bullets to Wizards is ironic in a city that shares a team named after an acknowledged racial epithet. *See* Grech, *supra* note 18, at C5 ("'Redskin' is the single most insulting word a Native American can be called in the English language. . . 'by using the name, people don't even know they are engaging in a tradition of racism.'").

New Washington N.F.L. team owner Daniel Snyder is apparently in good company with his racial insensitivities and cavalier attitude, as he joins thirty other N.F.L. team owners. According to the Reverend Jesse Jackson, the N.F.L. is a league supported by "a culture driven by white supremacists." Peter King, *Jackson: NFL coach-hiring practices 'a culture driven by white supremacists.'* <http://cnnsi.com/football/nfl/2000/playoffs/super_bowl/news/2000/01/28/Jackson_o/index.htm>, Jan. 29, 2000. "In a stinging rebuke of the National Football League's head-coach hiring practices the Rev. Jesse Jackson said Friday night that the slow pace of black coaching hires in the league is a result of a 'culture driven by white supremacists.'" *Id.* If a culture of white supremacy permeates the N.F.L., and presumably other professional sports, as Jackson alleges, then team owner refusal to change racists mascots and their debilitating mockery of cultures seems unquestionably discriminatory and hateful, just as their refusal to hire minority coaches seems so frighteningly out of touch. *See generally id.*

71. *See McBride*, 977 P.2d at 472 (Durham, A.C.J., dissenting).

72. *See id.*

73. *Id.* (internal citations and quotations omitted).

tive epithet as the 'n' word on a license plate."⁷⁴

The dissent concluded by stating that, rather than using the objective reasonable person standard, the majority should have based its analysis on the objections and evidence offered by the offended Native American petitioners or in other words, should have applied a reasonable Native American standard.⁷⁵

Petitioners introduced overwhelming evidence showing that the term "red-skin" is derogatory and profane, that it expresses contempt and ridicule, and that it references the historical domination of a defined class of persons based on race and ethnic heritage. This evidence demonstrates conclusively that the Tax Commission violated its own rule. By ignoring evidence and by establishing an arbitrary reasonable person standard, the majority misses the mark imposed by rule 873-22M-34.⁷⁶

C. Ruminations

Given the opportunity to make a defining statement in the nationwide debate over the use of Native American symbols and culture as mascots, the Utah Supreme Court majority failed. While its holding, that the challenged term might contain offensive connotations was the first judicial ruling of its kind and an obvious victory for Native American activists, the Supreme Court did not go as far as it could or perhaps should have.⁷⁷ The Tax Commission, taking its cue from the special concurrence and the dissent, invalidated the license plates unanimously.⁷⁸

While the majority went to great lengths to discuss "judicial restraint" and its obligation to protect "the integrity of the judicial system" in explaining away its indecisive statement and voice, it completely missed the importance of the "mandate" the decision in its entirety, actually decrees.⁷⁹ While

74. See *id.* "Notwithstanding this equivalence in the dictionary—an objective source indeed—the majority remands this case to the Tax Commission for further consideration. I would reverse the Tax Commission and immediately revoke the personalized plates at issue." *Id.*

75. See *id.*

76. *Id.*

77. Justice Zimmerman's concurrence suggests that although he signed on with the majority, if the Tax Commission on remand again found that the term "Redskin" was not offensive, when that decision was appealed, he would find outright that the term did contain at least one connotation that was offensive, and invalidate the license plates. See *supra* text accompanying notes 29, 58.

78. See *supra* note 12. The Tax Commission, just over one month after McBride was remanded, found as follows:

We conclude that the objective, reasonable person required to determine if there is 'any connotation that' the term Redskin is 'derogatory,' or expresses contempt or ridicule for a race or ethnic heritage, would be led to the inescapable conclusion that the term has at least one such connotation.

Tax Panel Revokes 3 "Redskin" Plates, DESERET NEWS, Mar. 5, 1999.

79. *McBride*, 977 P.2d at 470; *supra* notes 29, 58, 77.

Justice Zimmerman concurred in the majority opinion, he wrote “specially” to imply that if the Tax Commission, upon remand, came back with another “not offensive” holding, then the likely result would be a switch of his vote to the dissent position which position, objects more strongly to the use of the term and calls for invalidating the plates outright, thereby finding the term to be a racial epithet.⁸⁰ While Justice Russon made much of his self-proclaimed protector of judicial integrity status in the majority opinion,⁸¹ the implications of Justice Zimmerman’s opinion undermines the majority’s position.⁸² The Tax Commission was given a new standard by which to analyze the dispute on remand, but the Tax Commission was also told the appropriate response to bring back—through the pointed dissent and the warning of the special concurrence.⁸³

The majority also failed in its assessment when it casually referred to a “survey” that apparently found that of “425 Native American tribal leaders” surveyed, “72.24% of them did not find the term ‘Washington Redskins’ offensive.”⁸⁴ A cursory review of the literature simply does not bear this assertion out.

Racial insults are documented to cause psychological and physical harms. Indian team names and mascots in particular have been charged with fostering “racial stereotyping,” causing low self-esteem among American Indians, and setting up Indian children as targets for physical harassment by their peers. The racial epithet [n-word] has been held to be so intimidating that its use against a patron of a place of public accommodation constitutes a denial of full and equal enjoyment; the word “redskin” is similarly indicative of racial animus and comparable in vituperative force.⁸⁵

Other reports indicate that the “NCAI, which represents 520 Indian Nations, is ‘the oldest and largest national organization representative of and advocate for national, regional, and local tribal concerns.’”⁸⁶ Further, that in

80. See *id.* at 471 (Zimmerman, J. concurring specially).

81. See *id.* (“While Justice Durham would step into the role of a Utah State tax commissioner in order to weigh the evidence and decide the issue in the first instance . . . we refuse to do so. By exercising judicial restraint, we maintain the integrity of our system.”).

82. See *id.* at 470. Only Justice Russon and Chief Justice Howe refuse to make identifiable statements that the term “Redskin” contains at least one derogatory connotation. See *id.* at 468-471.

83. See generally *id.* at 470-473; see also *supra* notes 29, 58, 77.

84. *McBride*, 977 P.2d at 468.

85. *Public Accommodations*, *supra* note 69, at 911 (citations omitted). “Although there is some counter-evidence of Indians who do not object . . . a few dissenting voices should not undermine overwhelming opposition of Indian people . . . (“It is not a reasonable standard to expect unanimity from any other large group of people on a given issue, there are always a few dissenters”).” *Id.* n.86 (quoting from the HONOR Manual for Native American Advocacy).

86. *Id.* n.80.

"December 1991, the NCAI adopted a resolution 'urging educational institutions, businesses and organizations to abandon caricatures of American Indians that promote negative images and racism' and noting that Indian mascots, 'symbols that seem innocuous to some, are offensive to Indians.'"⁸⁷

The majority, in its rush to declare an objective, reasonable person standard, utterly failed to provide explanation or justification for rejecting more appropriate standards.⁸⁸ Perhaps more telling in its rush, the majority did not even address or analyze the national trend toward more specific race and gender conscious reasonableness standards, preferring instead to claim that relying on "any one group" is unreasonable because virtually any term could be objectionable.⁸⁹ The *McBride* majority seemed intent on protecting the status quo by selecting a safe, friendly standard that keeps the power firmly rooted in the Court and not with the offended Native American citizens.⁹⁰

The majority opinion in "gratuitously" declaring the binding standard in these cases to be that of the objective, reasonable person failed on many different levels.⁹¹

IV. REASONABLE PERSON STANDARD

For years the objective, reasonable person standard has done nothing more than perpetuate the viewpoints and biases of the white male judges applying that standard.⁹² Historically, reliance on the objective, reasonable per-

87. *Id.* When dozens of protesters showed up to demonstrate against the Washington N.F.L. team and petition the new owner to change the team name, over 30 groups sponsored the demonstration "including the 14 top national Native American groups and a number of religious and ethnic associations." Grech, *supra* note 18, at C5.

88. See generally *McBride*, 977 P.2d at 469-70; see *infra* note 91.

89. See *infra* notes 101-102 and accompanying text; see also *McBride*, 977 P.2d at 470.

90. See *infra* notes 92-95.

91. See *McBride*, 977 P.2d at 470 ("The only reasonable standard that may be applied is that of the objective, reasonable person. In other words, under rule 873-22M-34 the Commission had to determine, in light of all the evidence presented, whether an objective, reasonable person would conclude that the term 'redskin' contains any vulgar, derogatory, profane or obscene connotation, or expresses contempt, ridicule, or superiority of race or ethnic heritage.").

92. See BRUCE WRIGHT, *BLACK ROBES, WHITE JUSTICE* 7 (1987) ("Today various studies have found serious inequities in our judicial system. One reason, blacks believe, is because those who administer the systems of justice are mostly white males. They bring to their professions the same habits of prejudice that are inseparable from the lives they have lived, their white neighborhoods, their white clubs and the privileges of a white skin that they have always enjoyed."); Mary Anne Weiss, *Ninth Circuit Broadens Reasonableness Standard for Hostile Work Environment Sexual Harassment: Fuller v. City of Oakland*, 31 U.S.F. L. REV. 665, 701 (1997) ("The reasonable person standard, as the Ninth Circuit has recognized, reflects male bias."); A LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 87-90 (1996) ("Without using the explicit terms of slavery jurisprudence, the Supreme Court nevertheless gave those slavery precepts renewed vitality in the post-civil war era. African Americans were being killed because white citizens wanted to maintain white supremacy and to preclude African Americans from having any political power."); Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 8-9 (1996) ("Race Critics have challenged legal academe's hidden paradigms, an institutional consensus which consciously and

son standard has been a tool used by United States' courts to aggressively guard the status quo and maintain positions of power and influence crafted by and protected by the white male dominant voice.⁹³ Judicial officials rely-

unconsciously embraces a white male voice and his values.") [hereinafter Robinson, *Race, Myth and Narrative*]; andré douglas pond cummings, *Never Let Me Slip, 'Cause If I Slip, Then I'm Slippin'*: *California's Paranoid Slide from Bakke to Proposition 209*, 8 B.U. PUB. INT. L.J. 59, 63 n.27 (1998) ("I repeat, demographically, white males are a minority. But they are 80% of tenured professors, 80% of the U.S. Congress, 90% of the U.S. Senate, 97% of school superintendents, 92% of the top executives of all Forbes 400 industries, and 100% of all U.S. Presidents."); J. Clay Smith, Jr., *Open Letter to the President on Race and Affirmative Action*, 42 How. L.J. 27, 27-28 (1998). Professor Smith notes that in a survey of the general public (or those contributing to the objective, reasonable person opinion) the following beliefs are strongly held:

[A] poll by the National Opinion Research Center at the University of Chicago reveals that 53.2% of most Americans believe blacks are less intelligent, 62.2% believe they are less hardworking, and 77.7% believe they have a greater preference for living on welfare than whites.

Id. at 27-28. With such prejudices prevalent in society today, it seems clear that establishing objective, reasonable person standards, particularly with regard to race and under-represented minority groups, is short sighted.

93. See Linda J. Lacey, *We Have Nothing To Fear But Gender Stereotypes: Of Katie and Amy and "Babe Feminism,"* 80 CORNELL L. REV. 612, 631 (1995) (book review). Lacey argues that:

[c]ultural feminist insight [posits] that 'objectivity' and 'neutrality' are just masks for the perspective of the middle class white man. As Leslie Bender explains: 'limited male perspectives are masked, erased or universalized through techniques of objective, third-person language and author invisibility, but those techniques do not make them less limited in fact.' The phrase 'reasonable person' appears objective on the surface, but deciding exactly what type of behavior typifies the reasonable person is inevitably a subjective inquiry, subject to individual biases.

Id. at 631. While feminist scholars have written powerfully against a white male bias in sexual harassment and gender discrimination cases, Critical Race Theorists decry the white male voice and bias in the legal academy and in the judiciary as a whole. See Robinson, *Race, Myth and Narrative*, *supra* note 92, at 14.

What sociologists have long understood, many legal academicians now face. What Race Crits make self consciously a part of their legal analysis, white male legal scholars wish to reject. In short, while white male legal scholars may refuse to acknowledge that their identity is race mediated, Race Crits begin with the premise that race and white supremacy mediate the Law's meaning, institutional practices, and legal scholarship.

Id. Professor Robinson argues that so long as the white male bias and voice continues to permeate society and the American judicial system, presumably using the objective, reasonable person as a tool in such permeation, then True Liberty can never be known by white men:

the struggle remains verbally fierce and institutionally violent because white males are fighting to maintain their privileged lives, even though they have found no true personal happiness in praying to the false totem known as white supremacy. In this sense, if traditional and conservative white males are to gain true spiritual recogni-

ing upon an objective, reasonable person standard will generally draw only upon their own personal life experiences and when historically the cloth from which most judicial officers have been cut is that of a white male up-bringing of privilege, life experiences dealing with race, discrimination, poverty, equity and gender often escape or elude them.⁹⁴ Beyond the typical

tion, it would appear that we must necessarily witness the end of both the historical rationale for white supremacy and its privileged white male subjects. With the ending of recognition conditioned on oppression, white males can begin the inward journey toward True Liberty.

Id. at 36. Robinson concludes that "in this dialectical and violent struggle, whites have never known True Liberty because blacks and other people of color have never known it." *Id.*

Many authors have recognized the incongruity of mostly white male judges dispensing their brand of "justice" upon people of color. *See generally*, andré douglas pond cummings, *Just Another Gang: "When The Cops Are Crooks Who Can You Trust?"*, 41 How. L.J. 383, 405 (1998) ("In a system where judges and lawyers remain overwhelmingly white, blacks account for a share of the prison population that far outstrips their presence in the population as a whole.") [hereinafter cummings, *Just Another Gang*]; Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."); Ian F. Haney López, *White By Law*, in CRITICAL RACE THEORY: THE CUTTING EDGE 542 (Richard Delgado ed., 1995) ("In its first words on the subject of citizenship, Congress in 1790 limited naturalization to 'white persons.' Though the requirements for naturalization changed frequently thereafter, this racial prerequisite to citizenship endured for over a century-and-a-half, remaining in force until 1952. From the earliest years of this country until just a short time ago, being a 'white person' was a condition for acquiring citizenship.") (citations omitted).

94. *See* Wright, *supra* note 92, at 19. Judge Wright writes that "[w]hite people are conditioned from the time of their birth to the preferred status of their skin color. Their views of the world at large and their own environment become solidified by circumstances, presuppositions, myths, clichés, and traditional folklore." *Id.* Judge Wright underscores his point of white privilege by noting that: "in 1972 there were some 475 federal judges in America. Only 31 were black. Of 21,294 judges canvassed, only 255 were black. [In 1987], the number of black judges in America [was] said to be no more than 500, an average of 10 in each of the fifty states. In such places as Alabama, Mississippi, Wyoming, or Idaho, the black judge is rare. In New York, there are some 3,500 judges of which no more than 80 are black." *Id.* at 84.

The white male judges applying the reasonable person standard have all benefitted from white privilege throughout their lives, even if they did so unwittingly. *See* Stephanie M. Wildman with Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, in CRITICAL RACE THEORY: THE CUTTING EDGE 573, 575 (Richard Delgado ed., 1995). Wildman recites the following as to white male privilege:

Many feminist theorists have described the male tilt of normative standards in law, including the gendered nature of legal reasoning, the male bias inherent in the reasonable person standard, and the gender bias in classrooms. Looking more broadly at male privilege in society, definitions based on male models delineate many societal norms. As Catharine MacKinnon has observed: men's physiology defines most sports, their health needs largely define insurance coverage, their socially defined biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines God, and their genitals define sex.

judge's life experience that may be devoid of interaction with difficult issues of race, discrimination and poverty, one scholar writes that the goal of some in powerful positions focus on ensuring that the United States remain "a white man's country."⁹⁵

Often then, historically and still today, when a mostly male, mostly white court decides to apply an objective, reasonable person standard, the interpretation and subsequent result will likely be typical, traditional, slanted heavily toward the white male bias, and often unfortunate.⁹⁶ The very use of

Male privilege thus defines many vital aspects of American culture from a male point of view. The maleness of that view masked as that view is generalized as the societal norm, the measure for us all.

Id. at 575 (citations omitted).

95. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 136 (1998). Professor Kennedy believes that

[t]wo powerful antagonistic attitudes have shaped the decisions that have largely determined the course of American race relations. One . . . is marked by an insistence that, at bottom, the United States of America is, and should remain, a white man's country. A second attitude . . . rejects the legitimacy of an official pigmentocracy.

Id.

96. *See supra* notes 92-95. United States judicial history is replete with all white male courts absolutely skewering Native American citizens with biased, hateful and racist decisions. *See generally* Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Trade Chronicles as Racial History*, 34 ST. LOUIS L.J. 425 (1990) (detailing the Cherokee removal and the Trail of Tears focusing specifically on attempts by the Cherokee nation to have their rights protected in federal courts, to no avail); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) (outlining the repeated refusal of United States courts to honor treaties entered into by the U.S. Government and various Native American tribes whose rationale was that because the Native Americans were "[a] barbarous people" they were incapable of appropriately managing the land); Gerald Torres and Kathryn Milun, *Translating "Yonnonndio" by Precedent and Evidence: The Mashpee Indian Case*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 177 (Kimberlé Crenshaw et al. eds., 1995) (deconstructing a 1976 case where a judge and jury determined that the Mashpee Indians were not a "tribe" such that their property and land rights claims were dismissed). Torres and Milun write that:

[t]he tragedy, of course, is that the failure is not merely a failure of theory. The reservation system was badly conceived, but it never was truly intended to provide a foundation for potentially competing powers. The reservations were designed to pacify, not to compensate. The loss that Indians have suffered is material both in the damage to real people and in the destruction of cultures. What has been ruined may be irretrievable, and the continuing loss inexorable. To the extent cultures are destroyed or rendered incapable of self-expression, we are destroying individuals in disservice to what are ostensibly our own underlying values.

Id. at 189.

One scholar has examined the objective, reasonable person test in the context of police brutality and minority citizen abuse at the hands of law enforcement officers. *See* Robert V. Ward, Jr., *Consensual Searches, The Fairytale That Became A Nightmare: Fargo Lessons Concern-*

the objective, reasonable person standard is by historical definition, sexist and racist.⁹⁷

As one author writes:

[t]his reasonable man standard has been considered the arbiter of fairness, prudence, and impartiality; a summing up of the community's collective values. In the early nineteenth century when the reasonable man standard was first becoming established, judges, jurors, lawyers and law professors were all [white] men. Only recently has the reasonable man been transformed into the reasonable person to correct for male bias. Moreover, men continue to outnumber women in the legal community today. A standard that rests on community values like the reasonable person test tends to support the status quo. Because [white] men continue to dominate the legal community, the "reasonable person" standard reflects [white] male values.⁹⁸

Once again, this time in the state of Utah, a white male majority on the Supreme Court, adopted a standard of an objective, reasonable person, and continued the historical enshrinement of objective, reasonable white males.

One scholar writes that it is always:

inappropriate to use a reasonable person standard for disparagement when the group from which the reasonable person springs is the general public. In 1883, when Aunt Jemima first appeared, few among the general public

ing *Police Initiated Encounters*, 15 *TOURO L. REV.* 451, 460-61 (1999). Professor Ward writes:

Many of the Critical Race Theorists have attempted to focus attention on the peculiar adversarial relationship existing between members of minority communities and the police. Given the long history of abuse, these people are more apt to relinquish their rights out of fear rather than an act of free will. A cornerstone of the reasonable person test is the assumption that the police will honor a person's request to be left alone. People who are members of subordinated communities generally have little reason to believe that their assertion of constitutional rights will be honored. Indeed, the relationship between the citizen and the police is based on fear; fear which has been learned from a series of negative encounters with the police. It is the fear of the consequences of not cooperating with the police which compels many to abandon constitutional rights.

The substance of the critique by Critical Race Theorists is that in this setting, the Court's objective, reasonable person test, as generally applied, is oblivious to these real life problems of police abuse. One might even argue that the objective test perpetuates the cycle of police abuse.

Id. at 460-61 (citations omitted) (emphasis added). Clearly Professor Ward believes that the objective, reasonable person standard is inherently racist, just as feminist scholars believe the standard is inherently sexist. *See generally id.*; *supra* notes 92-95; *see also* cummings, *supra* note 93, at 389-97 (demonstrating police abuse against people of color within the United States).

97. *See supra* notes 92-96.

98. Weiss, *supra* note 92, at 672 (citations omitted). The objective reasonable person standard has been widely acknowledged as a test that protects the point of view of the dominant group in power. *See* GUIDO CALABRESI, *IDEALS BELIEFS, ATTITUDES, AND THE LAW* 22 (1985) ("[W]ays of looking at what is reasonable and what is not inevitably derive from the point of view of those who dominate law-making in a given society.").

found the mark disparaging, either to themselves or to blacks. Whether the "reasonable" person—which meant a reasonable white person, given whites' majority status—actually ever considered the question of whether blacks felt disparaged by the mark is highly doubtful. Today, who would argue that the mark was disparaging and highly offensive toward blacks? Had there been any doubt, the mark would not have gone through seven reincarnations.

The more appropriate course of action is to ask whether or not a "substantial composite" of the group identified (or implicated) by a mark, or similarly, whether or not a "reasonable person" who is a member of the group identified by a mark, would judge the mark to be disparaging. This might not be sensible in all disparagement inquiries, but is well-advised under circumstances suggesting that a mark might be disparaging a racial minority (such as blacks) and *particularly a very small minority with a history of mistreatment in this country (such as American Indians).*⁹⁹

In determining offensiveness and disparagement, it was inappropriate for the *McBride* majority to apply an objective, reasonable person standard, particularly when the reasonable person was likely drawn from Utah's general public, not from the offended minority group. Because many in the general public have been raised up at least aware of the Washington N.F.L. team, the football team undoubtedly comes to mind when the term is raised. Nevertheless, the brutal historical reminder of what the term actually means, and the acute sensitivity that Native Americans have toward the term and its background, makes the term especially offensive to Native Americans and sympathetic others. However, it seems that the term is generally inoffensive to the general public or the group of objective, reasonable persons upon which the *McBride* majority would draw.¹⁰⁰ In such circumstances, the reasonable person approach constituted a failure on the part of a state to protect its insular minority group citizens from discrimination and symbols of race hatred.

Further, the majority in its "gratuitous" declaration that the only appropriate standard was that of an objective, reasonable person, apparently failed thoroughly to research and recognize that other courts across the country have begun to apply standards specific to race and gender reasonableness.¹⁰¹

99. See Zlotchew, *supra* note 23, at 240-41 (emphasis added).

100. See generally *McBride*, 977 P.2d at 472-73.

101. See generally *Harris v. International Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991) (applying a standard of a reasonable black person in a racial harassment action); *Stingley v. Arizona*, 796 F. Supp. 424 (D. Ariz. 1992) (applying a reasonable African-American person standard in a racial harassment claim); *Price v. Philadelphia Electric Co.*, 232 Daily Lab. Rep. (BNA) at A-3-A-4 (Dec. 6, 1993) (the District Court instructed jurors to consider whether a "reasonable African-American" would be adversely affected by alleged racially hostile conduct); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (applying a reasonable woman standard in a sexual harassment action); *Andrews v. Philadelphia*, 895 F.2d 1469 (3d Cir. 1990) (applying a reasonable woman standard in a sexual harassment claim); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) (applying a reasonable woman standard in a sexual harassment ac-

The recent application of nationwide reasonable person standards that genuinely consider race and gender specifically as part of the standard, (the very definition of the "any one group" consideration vilified in the *McBride* majority), has gained so much national momentum, one author was moved to declare "[a]pparently, this standard is catching on rapidly."¹⁰² The *McBride* majority reached its conclusion as if it was completely unaware of the trend toward specific group reasonableness standards. Notwithstanding, the majority dismisses with no analysis or thought the standard suggested in the dissent, that of an objective, reasonable Native American.¹⁰³

The majority further attempted to draw support for its ineffectual standard from a California Appeals Court case using a test that specified that offensiveness determinations should be made by what "people of ordinary intelligence (who know the language in question) would understand from the use of the word."¹⁰⁴ The majority sought to buttress its own use of the reasonable person standard by citing a foreign state case that used a reasonable person standard to invalidate a personalized license plate that depicted the "F-word" in shorthand symbols.¹⁰⁵ Again, without support or rationale the majority appropriated the same standard and ignored the important factual differences between the California case and the Utah dispute. In *McBride*, the personalized vanity plate contained an offensive racial slur that disparaged a particularized minority group; in the California case, the objectionable term was a word that is globally (not particularly) offensive and does not implicate race, religion or ethnicity or contain an insult based thereon.

It seems logical that generally speaking, a white person, would not necessarily be offended by the term "Redskin." The term does not disparage white people generally, nor does it disparage a white ethnic group. Nevertheless, it seems just as logical that the sensibilities and ethics of a white person may be deeply offended by the use of the term "Redskin" when such person clearly understands the historical roots and implications of the term.¹⁰⁶ This offensive term does in fact disparage all Native Americans generally and specifically references the United States' historical practice of genocide and brutality. Notwithstanding, the majority found that relying upon the "opinion" of a specific group including Native American, was unreasonable and

tion); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) (applying a reasonable woman standard in a sexual harassment claim).

102. See Saba Ashraf, *The Reasonableness of the "Reasonable Woman" Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483, 498 (1992).

103. See *McBride*, 977 P.2d at 473 (Durham, A.C.J., dissenting) ("Based on the foregoing objections, I do not approve of the objective reasonable person standard enunciated in the majority opinion. Rather, I would hold that the objections and evidence offered by those offended should prevail.").

104. See *id.* at 470.

105. See *id.*

106. See *supra* note 39; see also *supra* notes 63-65 and accompanying text.

so finds without giving any legitimate or logical justification.¹⁰⁷

Unfortunately, the majority fails in an important opportunity to clarify issues and make definitive statements based on race and ethnicity, choosing instead to nonsensically dismiss more applicable standards while adopting one that it preferred. The standard the majority has enshrined is not likely to move the discussion forward, looking back as it does to the status quo usually preferred by the objective, reasonable person.¹⁰⁸

V. NATIONAL TRENDS

Five professional sports teams currently have American Indian names and mascots: the Atlanta Braves, Chicago Blackhawks, Cleveland Indians, Kansas City Chiefs, and Washington Redskins. The accompanying mascots, such as the Cleveland Indians' Chief Wahoo, represent stereotypical and racist depictions of American Indians. In addition, team mascots, players, and cheerleaders engage in "sham rituals"—war songs, dances, and actions like the "tomahawk chop"—that not only manifest blatant racism, but also constitute direct attacks on American Indian religious practices. In each team's home community, paraphernalia bearing offensive logos and slogans is ubiquitous. It is clear that the analogous use of any other racial or ethnic group as a sports team mascot would be "socially repugnant" and reprehensible.

A mounting chorus of protest denounces the use of Indian mascots and team names as a "virulently racist practice," and the public acknowledgment of impropriety is growing. Several major newspapers, for example, have announced that they will no longer publish team names that are racially or ethnically offensive. The District of Columbia City Council has passed a resolution requesting that the Washington Redskins change their name. Dozens of high schools and colleges have already replaced Indian nicknames and mascots. Despite this emergence of public sympathies in favor of change, professional sports team owners have refused to abandon discriminatory nicknames and mascots.

In addition to these political responses, several legal challenges have been brought against Indian team names and mascots, including attacks under trademark law, Title VI of the Civil Rights Act (prohibiting discrimination in federally funded programs) and a state pupil anti-discrimination law, as well as attempts to enact statutes denying stadium funding.¹⁰⁹

The momentum nationally has shifted in favor of the Native American protestors. This can be seen by coupling the Utah Supreme Court ruling and the subsequent Tax Commission finding, together with the recent U.S. Patent and Trademark panel decision invalidating seven registered Washington Redskins trademarks.¹¹⁰

107. See *McBride*, 977 P.2d at 469.

108. See *supra* notes 92-98.

109. *Public Accommodations*, *supra* note 69, at 904-05 (citations omitted).

110. See Erik Brady, *Term of Non-Endearment: Redskins, Petitioner at Odds Over Mean-*

Despite this momentum away from Native American mascots and logos, “dozens of colleges and thousands of high schools” still use variations of Native American names, terms, culture, and symbols as school and team nicknames.¹¹¹ Resistance to the reversal has been strong. Despite the fact that “over 100 colleges and universities” have replaced Native American team names and Indian mascots,¹¹² some fans and sports enthusiasts have charged that political correctness has “run amok” in this momentum.¹¹³

Nevertheless the sea change has begun. In Cleveland, Ohio, the public library system has enacted a new policy prohibiting its employees from wearing any paraphernalia that displays the “Chief Wahoo” moniker.¹¹⁴ In Tallahassee, Florida, the call has been made to drop the Florida State University “Seminoles” name and mascot and, particularly, to end the football crowd rituals of the “tomahawk chop,” face paint, war whoops, and the wearing of Native American headdresses.¹¹⁵ While the calls have been initi-

ing of Nickname, USA TODAY, May 12, 1999, at C1-C2. In the case pending for over seven years, *Harjo v. Pro-Football, Inc.*, several Native American petitioner’s challenged the Washington Redskins trademark as disparaging and offensive. The three panel court agreed and invalidated the trademark, pending appeal. *See id.*

111. *Public Accommodations*, *supra* note 69 n.2. The use of Native American mascots is still widespread and prevalent. *See id.* In Wisconsin, 54 school districts have schools with Native American nicknames while 71 schools in New Jersey have Native American nicknames or team mascots. *See id.*

112. *Id.* n.16.

113. *See* Weingarten, *supra* note 70, at C1. In sarcastically encouraging new owner Daniel Snyder to change the name of the Washington Redskins, Weingarten states that “[i]f you make this change, the average Redskin fan may fuss and grumble about tradition and oversensitivity. You will be accused of *political correctness*. . . . On some level, [the average Redskin fan] understands this name has to go.” *Id.* (emphasis added). Despite new awareness, many sports enthusiasts express contempt toward individuals and schools changing racist mascots and logos. To wit, on March 13, 1999, while driving through Louisiana, a sportstalk radio program, WSKR Baton Rouge, *The Team*, was on the air discussing college basketball’s 1999 “March Madness.” Several sportscasters continually referred to St. John’s basketball team as the “Red Men” rather than the school’s official moniker “Red Storm.” Because St. John’s run through the tournament was particularly strong, the sportscasters referred to the team over and over again, and in so doing made it a point to disparage St. John’s University for “bowing” to public pressure and caving in to “political correctness” when it officially changed its mascot from “Red Men” to “Red Storm” several years ago. The sportscasters then vowed to never cave to “political correctness” and maintained that as long as they both lived, they would always refer to St. John’s University as the “Red Men.” Many of the listeners called in and applauded the sportscasters for clinging to traditional American norms and refusing to let political correctness rule the day.

114. *See Public Accommodations*, *supra* note 69 nn.3-4 (“Chief Wahoo is a grinning caricature of an American Indian ‘nearly always painted bright red with overly huge front teeth, shifty eyes, and a headband with a feather protruding from behind.’”)

115. *See generally* Alan Schmadtke, *Professor: Drop Seminoles*, <http://www.orlando.sentinel.com/sports/colleges/041599_FSU_15_13.HTM>, Apr. 15, 1999. A highly regarded member of Florida State University’s athletic board recently addressed the board as follows:

We’re going to lose this issue. It’s only a matter of time. . . . It doesn’t help to have plains Indians representing seminole Indians [on logos] on shirts out there—that we make a large profit on—with caricatures that are degrading [to Native Americans]. . . . I’m here to tell you we’re in a decided minority on this issue. We’re es-

ated to drop the "Seminoles" as a mascot and to drop the sham rituals, resistance will undoubtedly be strong from the Florida State community.¹¹⁶ Every Saturday football home game in Tallahassee, finds over 80,000 fans standing in Doak Campbell Stadium chanting and wielding imaginary tomahawks.¹¹⁷ This time honored derogatory tradition will be difficult to break for many Floridians.

Nevertheless, professional sports teams that adamantly refuse to give up racist logos and culturally derogatory mascots will ultimately be implicated by history and such judgments will be harsh.¹¹⁸

In Cleveland, Ohio, protestors continue to dog Cleveland Indians ownership and owner Dick Jacobs for staunchly refusing to change the teams' logo and mascot.¹¹⁹ On opening day 1999, at the stadium entrance, protestors laid a straw Chief Wahoo inside a coffin and proceeded to burn the coffin to ashes.¹²⁰ Several protestors claimed that their actions were designed to make America aware of obvious racism still aimed at Native Americans today and at their culture.¹²¹ "The main thrust of the Native American community is to call attention to the racism of the Chief Wahoo logo. . . . Going to Jacobs Field and demonstrating is a critical part of that," claimed Native American Attorney Terry Gilbert.¹²² To draw attention to the cause whenever the Atlanta Braves or Cleveland Indians have played in the World Series, protestors have come out in force seeking to turn national attention toward private use of publicly disparaging mascots and logos.

entially alone on this issue, Frankly. I know the alumni don't want to hear it, the fans don't want to hear it, the boosters don't want to hear it. But this is a losing battle.

Id.

116. *See generally id.* Professor Schmadtke points out just how resistant he expects alumni, students and fans to be to the suggested changes by affirmatively stating that he knows the alumni and fans "don't want to hear it." *See id.*

117. *See generally id.*

118. *See generally supra* note 96. When reflecting on poor reasoning and racist language used historically in past opinions, the refusal by owners of professional sports teams to do the right thing by changing the names of their franchises, will likely be viewed in the future as stubborn and ignorant.

119. *See Protestors of Cleveland Indians' Logo Burn Coffin*, <<http://www.pointcast.com>>, <<http://127.0.0.1:15841>>, Apr. 12, 1999. As the Cleveland Indians opened the 1999 baseball campaign, the team was greeted by dozens of protestors challenging the teams' use of Chief Wahoo as a symbol and logo and "Indians" as the team mascot. *See id.*

120. *See id.* "Similar protests against the grinning, red-faced Chief Wahoo have resulted in arrests in recent years, but there were no arrests Monday [April 12, 1999]." *Id.*

121. *See id.*

122. *Id.* For years Native Americans and others have protested the use of the "Indians" name and the Chief Wahoo logo, sometimes resulting in arrests and later claims of wrongful arrest, illegal imprisonment and violation of free speech rights by those arrested. *See id.* "Five protestors who were arrested on suspicion of arson last year after a straw figure of Wahoo was burned have sued city police for allegedly violating their civil rights." *Id.*

Further, in a weak attempt to deflect growing public criticism, the Cleveland Indians organization has floated the notion to the media and its fans that the team name of "Indians" is actually an honorarium of the first ever Native American baseball player, Louis Sockalexis, who, according to team officials, played for the Indians in the 1890s.¹²³ "The Indians have long maintained that their name honors Louis Sockalexis, a Penobscot Indian, who was the first American Indian to play major league baseball more than 100 years ago."¹²⁴ More recently, the Washington N.F.L. team organization, in its own weak attempt to deflect growing public criticism, also claimed that the name "Redskins" was taken to honor a Native American historical figure involved with football.¹²⁵ Washington team officials claim that "their name honors Lone Star Deitz, an early coach of the team who was part Sioux."¹²⁶

Amazingly, Washington team officials have recently claimed that "[o]ver the long history of the Washington Redskins, the name has reflected positive attributes of the American Indian such as dedication, courage and pride. . . . The team has become an institution in the city of Washington, and the team's popularity unifies the nation's capital."¹²⁷ One Native American activist vigorously disputes the Washington team officials' declarations by proclaiming that "[t]he name has never been an honorific, and no matter how many times they say, it never will be. . . . 'To persist in this is so arrogant. . . . The owners . . . cannot claim ignorance.'"¹²⁸

This stretch by Cleveland and Washington to attach historical significance and relevance to their racist logos and mascots might be humorous if it were not so hypocritical and myopic. Recent articles and cursory research has found that no evidence exists historically that the "Indians" took the name to honor a Native American ballplayer but was a mascot instead selected by a "group of sports writers."¹²⁹

History will judge harshly the private owners of these professional sports franchises for clinging so tenaciously to their racist, derogatory, de-

123. See Milton Alan Turner, *Indians Deserve New Name for Millennium*, USA TODAY, May 18, 1999, at C3.

124. *Id.*

125. *See id.*

126. *Id.*

127. Grech, *supra* note 18, at C5. Washington team officials apparently ignore the historical roots and connotations of the term "Redskin" when they try to claim that the team's use of the name is a noble one, like unto an honorarium. *See id.*; *see also supra* note 70, and accompanying text.

128. *See Grech, supra* note 18, at C5 ("Words have meaning. We signed so many treaties that didn't mean what we thought they did. . . . At first it may appear to be a narrow issue [the Redskin dispute], but it is so contextual, so atmospheric. If we can't get this right, how can we work on the more difficult issues?").

129. *Id.* "However, a May 17 Cleveland Plain Dealer article reveals that a check of four Cleveland newspapers from Jan. 1 through April 15, 1915 does not support this theory [that the team was named to honor Sockalexis] and suggests that the decision was made by a group of sportswriters." *Id.*

meaning and ultimately insensitive mascots, logos and rituals.¹³⁰

V. CONCLUSION

The Utah Supreme Court ruling, together with the Tax Commission's subsequent finding, mark the beginning of the sea change with respect to Native American symbols, names and rituals as mascots and logos.¹³¹ The U.S. Patent and Trademark decision, which was announced just months after the Utah Supreme Court ruling, will also serve to force appropriate change through the law.¹³² Additionally, as courts across the country move toward opening and redefining the reasonable person standard to a point where offensiveness will be determined according to a reasonable member of the target group standard, the force of judicial opinion should finally shift. Ultimately, the distant yet distinct voice of Native American citizens will be heard.¹³³

130. See *supra* notes 96, 118.

131. See *supra* notes 106-128.

132. See *supra* note 110.

133. See WALEDA, *Wounded Knee*, on WALEDA (Mercury Records, 1997). This trio of Native American (Cherokee) recording artists poignantly call for a future where their voices will be heard and remembered.

Bury my heart at wounded knee; where a baby's blood was a soldiers pay; bury my heart at wounded knee; let it lie with my brothers 'till the judgment day; my people were the earth and the earth was home; when they stole their land then they stole their bones; let my people, let my people pass crossing over this Jordan is all we ask, take the eyes of the guns of peace; my people can't eat promises, but they can pray; now my blood is flowing back to Tennessee; and my soul is moving in and out of reach; I'm dancing cause I carry my father's seed; and I'm walking on this earth to see my people free. Bury my heart at wounded knee.

Id.